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In The

Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons, a question on which the courts of appeals are in conflict.

PARTIES TO THE PROCEEDING

Petitioner Tony Goodman brought this civil action against the State of Georgia and the Georgia Department of Corrections, as well as J. Wayne Garner, A.G. Thomas, Johnny Sikes, J. Brady, O.T. Ray, H. Whimbly, Margaret Patterson, and R. King. The individual named defendants were sued in their personal and official capacities as state prison officials.

All the defendants participated as appellees before the United States Court of Appeals for the Eleventh Circuit. The United States intervened in the court of appeals, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of the statute.

The United States and each of the defendants are respondents in this Court pursuant to this Court's Rule 12.6, but the question presented herein has no application to the individual named defendants sued in their personal capacities.

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OPINIONS BELOW

The opinion of the Eleventh Circuit (App., *infra*, 1a-23a) is unreported. The district court's opinion granting summary judgment to the State on sovereign immunity grounds (App., *infra*, 24a-28a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004, and denied a petition for rehearing *en banc* on December 9, 2004. App., *infra*, 29a-30a. This petition is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Eighth, Eleventh, and Fourteenth Amendments to the United States Constitution, and of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth at App., *infra*, 31a-36a.

STATEMENT OF THE CASE

1. Title II of the Americans with Disabilities Act of 1990 (ADA) generally prohibits any "public entity" – including state-operated prisons – from "subject[ing]" any "qualified individual with a disability" to "discrimination." 42 U.S.C. § 12132; *Pennsylvania Dep't of Corrections v. Yesky*, 524 U.S. 206 (1998). Title II may be enforced through private suits against public entities, including state agencies. 42 U.S.C. § 12133. Congress expressly abrogated the States' Eleventh Amendment sovereign immunity from private suits in federal court. 42 U.S.C.

§ 12202. Based on detailed findings by Congress concerning the nature and persistence of discrimination against persons with disabilities, Congress expressly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" in enacting the ADA. 42 U.S.C. § 12101(b)(4).

2. Petitioner Tony Goodman has paraplegia and uses a wheelchair to move about. App., *infra,* 2a. In 1995, Goodman was convicted and sentenced in Georgia state court to a term of imprisonment. *Ibid.* This case involves his treatment by Georgia at the Georgia State Prison in Reidsville, Georgia (GSP), during Goodman's incarceration in that prison from 1996 to 1999, and from 2004 to the present. *Id.* at 2a, 20a.

While at GSP, Goodman is confined to a 12-foot by 3-foot cell "for twenty-three to twenty-four hours per day." App., *infra,* 4a.[1] Goodman's cell is too narrow to permit him to turn his wheelchair around; as a result, he is "virtually immobile." *Id.* at 5a.

Because "the prison 'lacks facilities for the disabled for hygiene, drinking, and performing body excretion functions,'" App., *infra,* 4a (quoting complaint), Goodman "was forced to sit in his own bodily waste" on "several instances," *id.* at 18a, and on a number of occasions he has experienced significant injuries (including several broken bones and a seizure) when he attempted to use the toilet

[1] As the court of appeals noted, "[w]hile Goodman has had some disciplinary problems in the past, Goodman's allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this [was] apparently the size of his cell whether or not he [was] in disciplinary isolation." App., *infra,* 4a.

or shower, *see id.* at 6a-7a. Defendants have denied Goodman "catheters and rehabilitative therapy," "failed 'to provide any assistance in preventing dangerous bedsores,'" and denied him "appointments with mental-health counselors." *Id.* at 8a (quoting complaint).

Goodman has "suffered 'long periods of deprivation of basic amenities,' such as 'showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service'" because of the prison's inaccessibility. App., *infra,* 6a (quoting complaint). And he has been denied access to "virtually all prison programs and activities because of his disability," *id.* at 18a, including the law library and chapel, *id.* at 25a. Numerous GSP officials, from the Warden and Deputy Warden to the line staff at the prison, are aware of these problems and have done nothing to address them. *Id.* at 8a-9a.

3. In 1999, Goodman filed this suit *pro se* in the United States District Court for the Southern District of Georgia. App., *infra,* 20a. He named as defendants the State of Georgia, the Georgia Department of Corrections, and a number of Georgia prison officials. *Id.* at 3a. On the basis of the facts discussed above, Goodman asserted two basic claims. First, invoking 42 U.S.C. § 1983, he alleged that the defendants had violated his Eighth Amendment right to be free of cruel and unusual punishment. App., *infra,* 3a. Second, he alleged that the defendants had violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* App., *infra,* 3a. Goodman sought monetary damages on both claims and injunctive relief on the ADA claim. *Ibid.*

The district court dismissed Goodman's Section 1983 claim against all defendants for failure to state a claim. App., *infra,* 9a-10a. But the court denied the parties' cross-motions for summary judgment on the ADA claim and set the case for trial; the court found that a genuine issue of material fact existed regarding whether the defendants were in compliance with the ADA. *Id.* at 11a-12a.

In October 2001, following this Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), defendants filed a renewed motion for summary judgment. App., *infra*, 12a. Defendants contended that state sovereign immunity protected by the Eleventh Amendment barred Goodman's claims insofar as he seeks damages against the State and that Goodman's claim for injunctive relief had been rendered moot when he was transferred out of GSP in 1999. *Ibid.* The district court agreed and granted the motion. *Ibid.*

4. The Eleventh Circuit affirmed in part and reversed in part. App., *infra*, 1a-23a. On the Section 1983 claim, the court of appeals reversed, holding that Goodman's complaint stated a claim for a violation of the Eighth Amendment in three respects. First, by confining him to a cell in which he could not move his wheelchair, the individual defendants effectively imposed "some form of total restraint twenty-three to twenty-four hours-a-day without penal justification," in violation of the principles articulated in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). App., *infra,* 18a. Second, by forcing Goodman "to sit in his own bodily waste because prison officials refused to provide assistance," the individual defendants violated the principles articulated in a long line of appellate-court Eighth Amendment cases that have "accord[ed] particular weight to exposure to human waste." App., *infra*, 18a &

n.10 (citing *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)). Finally, by "knowingly providing no physical therapy and inadequate medical treatment," by their "systematic denial of access to virtually all prison programs and activities because of [Goodman's] disability," and by providing "woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails," the individual defendants showed "deliberate indifference" to Goodman's "serious medical condition." App., *infra*, 18a-19a; *see Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976).

On the ADA claim, the court of appeals sought additional briefing from the parties (including the United States, which intervened to defend the constitutionality of the statute) following this Court's decision in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Subsequent to that briefing, the court of appeals affirmed the district court's holding that Goodman's claims against Georgia and the Georgia Department of Corrections are barred by the Eleventh Amendment's protection of state sovereign immunity. App., *infra*, 19a.[2] The court of appeals relied on its decision in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), in which

[2] The court of appeals held that Goodman's claims for injunctive relief against state officials in their official capacities could proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and it reversed the district court's conclusion that Goodman's transfer out of GSP mooted the request for injunctive relief because Goodman had been transferred back to GSP in the interim. *See* App., *infra*, 20a-21a.

the same three-judge panel had ruled, again after supplemental briefs addressing the impact of *Lane*, that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence" that this Court uses to assess the validity of Fourteenth Amendment legislation. *Id.* at 1273, 1275 (citing *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997)). Title II's abrogation of state sovereign immunity was thus not a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment, in the court's view, even in a case like *Miller* or the present case, where the plaintiff states a claim that the conditions challenged under Title II also violate his constitutional rights. *See id.* at 1276 n.34.

5. The court of appeals denied a petition for rehearing *en banc* filed by intervenor the United States. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

This case concerns a matter of longstanding disagreement in the lower courts. Before this Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the courts of appeals divided over the question whether Title II of the ADA applied to the operations of state prisons. The courts that rejected such an application of the ADA argued that an effort by Congress to extend its protections to inmates with disabilities would raise serious constitutional concerns. *See, e.g., Amos v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 603-604 (4th Cir. 1997), *vacated and remanded in light of Yeskey*, 524 U.S. 935 (1998). In *Yeskey*, however, this Court

held that Title II of the ADA *does* by its terms apply to the operation of state prisons. *See Yeskey*, 524 U.S. at 210-212. But the Court reserved the question whether Congress had constitutional authority to extend the ADA to that context. *See id.* at 212-213.

In *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), this Court held that Title II of the ADA represents a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, and thus could abrogate state sovereign immunity, at least insofar "as [the statute] applies to the class of cases implicating the accessibility of judicial services." *Id.* at 1993. Since *Lane*, the lower courts have addressed Congress's Section 5 authority to abrogate immunity to Title II suits in a variety of other contexts. In the prison context, the courts of appeals that have addressed this question already are in conflict with one another. *Compare* this case and *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004) (application of Title II to prison context exceeds Congress's Section 5 authority), *with Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004) (upholding Section 5 basis for Title II in prison case), *pet. for cert. filed*, No. 04-947 (Jan. 15, 2005).

This case presents the ideal vehicle to resolve that conflict in the Circuits. The extensive factual record developed here gives the Court the opportunity to address each of the three distinct Section 5 arguments regarding the constitutionality of the ADA's abrogation that have been addressed by the courts of appeals: that Title II is proper Section 5 legislation in all of its applications; that the statute is proper Section 5 legislation in its applications to the class of cases involving prisons; and that Title II is proper Section 5 legislation at least in those cases in which the statute provides a remedy for a violation of the

plaintiff's constitutional rights. In *Columbia River Correctional Institute v. Phiffer*, No. 04-947, in which a petition for writ of *certiorari* is pending, this Court would not be able to reach all of these points of conflict between the Circuits, because that case contains no claim that the alleged Title II violation also violates the Constitution. Accordingly, the Court should grant *certiorari* in the instant case to resolve the circuit conflict.

A. The Courts Of Appeals Are In Conflict Regarding Whether, And To What Extent, The ADA Validly Abrogates State Sovereign Immunity In The Prison Context

1. There is a clear and direct conflict among the Circuits regarding the question whether Congress has Section 5 power to abrogate state sovereign immunity for private suits under Title II of the ADA in cases involving state prisons. In the case under review, the Eleventh Circuit held that such an application of the ADA went beyond Congress's power. In so holding, the court of appeals followed its decision in *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004), which affirmed the dismissal, on Eleventh Amendment grounds, of the Title II claim of another Georgia prisoner who uses a wheelchair.

In *Miller*, as here, the Eleventh Circuit held that the plaintiff could proceed under Section 1983 with his claim that state officials violated his Eighth Amendment rights. *See id.* at 1261-1263. But the court nonetheless held that the plaintiff's Title II claim was barred by the Eleventh Amendment. The Eleventh Circuit believes that *Lane*'s holding that Title II validly abrogated state sovereign immunity in the access-to-courts context cannot extend to the prison context because, in that court's view, Title II

"goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment." *Miller*, 384 F.3d at 1274. Accordingly, the court held that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." *Id.* at 1275. The court below followed its *Miller* holding to rule that Goodman's Title II damages claim in the instant case is barred by the Eleventh Amendment. *See* App., *infra*, 19a.

The instant case directly conflicts with the Ninth Circuit's decision in *Phiffer*, which held "that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." 384 F.3d at 792. There can be little doubt that the conflict in the Circuits will persist. In *Phiffer*, a prisoner alleged that Oregon prison authorities' failure to accommodate his disability caused him severe physical pain. He sued under Title II and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the district court denied a motion by the State for judgment on the pleadings on sovereign immunity grounds. *Phiffer*, 384 F.3d at 792. On interlocutory appeal prior to this Court's decision in *Lane*, the Ninth Circuit affirmed the denial of the motion to dismiss. *See Phiffer v. Columbia River Corr. Inst.*, 63 Fed. Appx. 335 (9th Cir. 2003). Following *Lane*, this Court granted *certiorari*, vacated, and remanded for further consideration. *See* 124 S. Ct. 2386 (2004). On remand, the Ninth Circuit concluded that its initial resolution of the case was "consistent with *Lane*'s holding," and it "reissue[d its] original disposition in per curiam form without further amendment." *Phiffer*, 384 F.3d at 792.

The *Phiffer* court relied on a series of pre-*Lane* Ninth Circuit cases, one of which arose in the prison context, as

"clearly command[ing] the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." *Ibid.* (citing *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)). Those earlier cases held that Title II, in all of its applications, was a valid exercise of Congress's Section 5 power. *See Dare*, 191 F.3d at 1175-1176 (holding that Title II "as a whole constitutes a proper exercise of Congress' power to legislate under § 5"); *Clark*, 123 F.3d at 1270 (holding generally that "both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment"). Although the State contended that those cases were inconsistent with *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), the Ninth Circuit responded that it had already "revisit[ed]" its precedent and had "already rejected the State's claims." *Phiffer*, 384 F.3d at 792-793 (citing *Hason v. Medical Bd.*, 279 F.3d 1167, 1171 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 958 (2003); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002); *Lovell v. Chandler*, 303 F.3d 1039, 1050-1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003)). Accordingly, the court "decline[d] further review of [its] settled precedent," despite the concurrence's statement that the "continued vitality" of those cases "is uncertain" after *Lane*. *Id.* at 793 (O'Scannlain, J., concurring).

Other courts have also demonstrated confusion regarding the effect of *Lane* on prison litigation brought

under Title II of the ADA.[3] This Court's intervention is necessary to resolve this enduring conflict.

2. The Eleventh Circuit's ruling also implicates a broader confusion regarding the method for applying the "congruence and proportionality" analysis established in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), to Title II of the ADA. In its opinion below, the court of appeals held that Congress lacks power under the enforcement provision of the Fourteenth Amendment to abrogate state sovereign immunity when applying the ADA to the prison context – even in a case in which the conduct that violates the ADA also violates the Constitution itself. Although the court allowed Goodman's Eighth Amendment claims brought under Section 1983 to proceed against the state officials in their individual capacities, it concluded that Goodman's ADA claims against the State – based on

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[3] *Compare Mercer v. Rodriquez*, 849 A.2d 886, 888, 895 (Conn. App. Ct. 2004) (rejecting State's argument that "sovereign immunity barred the court's jurisdiction over [a prisoner's] claims for damages" under Title II of the ADA, and relying on *Lane* to hold that "the Superior Court had subject matter jurisdiction over the plaintiff's claims"), *and Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (Title II claim that prison forced prisoner who had difficulty walking to walk great distances to use law library "*is* actionable under" *Lane*), *with Degrafinreid v. Ricks*, No. 03-6645, 2004 WL 2793168, at *6 (S.D.N.Y. Dec. 6, 2004) (prisoner's Title II claim barred by Eleventh Amendment absent specific allegation that defendants' conduct "was driven by 'discriminatory animus or ill will'"); *see also Spencer v. Easter*, 109 Fed. Appx. 571, 573 (4th Cir. 2004) (stating in prison conditions case that *Lane* "did not, however, decide whether the statutory abrogation of sovereign immunity was constitutional with regard to non-fundamental rights," but resolving case on other grounds), *cert. denied*, No. 04-8293 (Mar. 7, 2005); *Flakes v. Frank*, 322 F. Supp. 2d 981, 982 (W.D. Wis. 2004) (concluding that *Lane* might permit the prisoner-plaintiff to overcome the State's Eleventh Amendment immunity defense).

precisely the same conduct – are barred by sovereign immunity. App., *infra*, 19a.

By contrast, other Circuits have concluded that, at the very least, Title II represents a proper exercise of Congress's Section 5 power in cases in which the statute provides a remedy merely for a violation of the plaintiff's constitutional rights. In *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the Second Circuit held that Congress could abrogate a State's sovereign immunity from damage actions for violations of Title II "motivated by discriminatory animus or ill will based on the plaintiff's disability" because "actions based on discriminatory animus or ill will towards the disabled are generally the same actions that are proscribed by the Fourteenth Amendment – *i.e.*, conduct that is based on irrational prejudice or wholly lacking a legitimate government interest." *Garcia*, 280 F.3d at 111. Similarly, the Sixth Circuit held in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (*en banc*), *cert. denied*, 537 U.S. 812 (2002), that Congress had validly abrogated a State's immunity to a Title II claim when "[a]s applied to the case" before the court, the ADA's requirement "serves to protect [the plaintiff's] due process right." 276 F.3d at 815.

A panel of the First Circuit elaborated on the basis for these holdings in *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002). In *Kiman*, a prisoner sued for ADA violations that also constituted actual violations of the Eighth Amendment. The panel held that "Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state." *Id.* at 24. Citing

United States v. Raines, 362 U.S. 17 (1960), the panel noted that "[g]enerally, a court will not strike down a statute as unconstitutional unless it is convinced that the statute is unconstitutional on the facts of a specific case, that is, as applied to the party that argues for unconstitutionality." 301 F.3d at 20. The panel concluded that " there is no affront to protected dignity or fiscal interests from requiring the states to appear and defend their conduct when Congress has provided the remedy of a private suit for a specific constitutional violation. Without such concerns at stake, we follow the traditional approach of taking small steps and considering separately the separate applications of a statute." *Id.* at 22.[4]

In holding to the contrary, the Eleventh Circuit deemed it irrelevant that the plaintiff invoked Title II to challenge actions that – according to the court's own opinion on the Section 1983 claim – violate the Eighth Amendment. The court read *Lane* as requiring that the Section 5 basis for Title II be "considered context by context," *Miller*, 384 F.3d at 1276 n.34, meaning that it had to consider the abrogation's constitutionality in one fell swoop for all potential suits that could be brought in the state prison context. Because it concluded that *other* applications of Title II in the state prison context went

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[4] On rehearing *en banc* in *Kiman*, the First Circuit affirmed, by an equally divided court and without opinion, the district court's order dismissing the case on sovereign immunity grounds. *See Kiman v. New Hampshire Dep't of Corr.*, 332 F.3d 29 (1st Cir. 2003) (*en banc*). This Court subsequently granted *certiorari*, vacated the judgment, and remanded for further consideration in light of *Lane*. *See* 124 S. Ct. 2387 (2004). The case was returned to the district court for further proceedings.

beyond what is "necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment," the court held that the statute could not validly abrogate state sovereign immunity in *any* case "in the Eighth-Amendment context [involving] state prisons." *Id.* at 1274-1275.

The conflict between the Ninth and Eleventh Circuits on the application of Title II to state prisons thus reflects a deep disagreement in the lower courts over the levels of generality at which congruence and proportionality analysis may be conducted. This Court's intervention is necessary to resolve that disagreement.

B. The Eleventh Circuit's Sovereign Immunity Ruling Is In Error

In *Lane*, this Court reserved the question whether Title II of the ADA is valid Section 5 legislation in all of its applications. *See Lane*, 124 S. Ct. at 1992-1993. But whatever the answer to that broad question, the Eleventh Circuit's decision involving constitutional violations in the state prison context clearly contravenes the principles this Court set forth in *Lane*.

1. The Eleventh Circuit's holding that Title II exceeds Congress's Section 5 authority in the prison context is inconsistent with *Lane*'s holding that Title II is proper Section 5 legislation at least insofar "as it applies to the class of cases implicating the accessibility of judicial services." *Lane*, 124 S. Ct. at 1993. The Court noted that the Due Process Clause, and various Bill of Rights provisions incorporated therein, guarantee individuals with disabilities a "right of access to the courts," *id.* at 1988, and that this right imposes on States "a number of affirmative obligations" to facilitate court access, *id.* at 1994.

The Court also noted a substantial record of state violations of those obligations. *See id.* at 1989-1992. In light of that record, the Court concluded that, at least as applied to guarantee access to the judicial system, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id.* at 1994.

For similar reasons, Title II is an appropriate exercise of Congress's Section 5 authority to safeguard the rights of an historically marginalized population in "the prison context, when the government's power [over an individual] is at its apex." *Johnson v. California*, 543 U.S. ___, ___, 2005 WL 415281, at *8 (Feb. 23, 2005). As in the access-to-courts context addressed in *Lane*, the Constitution imposes on states a series of affirmative obligations with respect to those in their custody. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 (1989) (recognizing that States have "affirmative duties of care and protection with respect to," *inter alia*, prisoners). In particular, the Eighth Amendment, as incorporated in the Fourteenth Amendment, requires States to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Of particular importance to prisoners with disabilities, state officials violate the Constitution when they act with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

And the Constitution imposes on States a range of other affirmative obligations in the prison context, many of which are implicated by the facts of the instant case based on Goodman's demonstration that he was deprived

of access to the law library and the chapel. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (state must provide prisoners with "meaningful access to the courts") (internal quotation marks omitted); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (state must afford prisoners "reasonable opportunities" to exercise their religion); *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980) (state must provide procedural protections before transferring prisoner to a mental hospital).

These affirmative obligations must be viewed against the backdrop of the State's general obligation under the Equal Protection Clause not to engage in arbitrary or irrational discrimination on the basis of disability. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985). As this Court recently noted, the right to be free from invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 543 U.S. at ___, 2005 WL 415281, at *7. Compliance by prisons with the Equal Protection Clause "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Ibid.*

Unfortunately, States have frequently violated the constitutional rights of prisoners with disabilities. Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * institutionalization," 42 U.S.C. § 12101(a)(3), a finding this Court said "can be thought to include penal institutions." *Yeskey*, 524 U.S. at 211. This Court has also noted the pattern of state violations of the constitutional rights of disabled prisoners, *see Lane*, 124 S. Ct. at 1989 & n.11, and lower-court cases provide

"confirming judicial documentation" of it. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).[5]

Given the affirmative obligations the Constitution imposes on States in their treatment of prisoners with disabilities, and the extensive history of state violations of those obligations, the conclusion that the Court reached in *Lane*'s access-to-courts context applies equally here: "Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in [state prisons] cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct. at 1994 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). The Eleventh Circuit was wrong to reach a contrary conclusion, and the issue is squarely presented for this Court's review.

2. The court of appeals contravened the principles set forth in *Lane* in a second way – by holding that Title II

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[5] *See, e.g.*, *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to prisoner with paralysis, resulting in prisoner's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson v. Coughlin*, 893 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf prisoners during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

could not validly abrogate state sovereign immunity even in a case in which the statute does nothing more than provide a remedy for an actual violation of the plaintiff's constitutional rights. The Eleventh Circuit read *Lane* as requiring the abrogation issue to be "considered context by context." *Miller*, 384 F.3d at 1276 n.34. Under that court's reading, unless Title II is valid Section 5 legislation as applied to *all* prison cases it cannot be valid Section 5 legislation as applied to *any* prison case – even one in which the plaintiff's constitutional rights have been violated. That all-or-nothing approach reflects a fundamental misreading of *Lane*.

In *Lane*, 124 S. Ct. at 1993 & n.19, this Court reaffirmed the holding in *Raines*, 362 U.S. at 24-25, that a statute must be upheld if Congress had power to reach the particular fact setting addressed by the complaint – even if other applications of the statute might exceed congressional power. Congress plainly has Section 5 power to provide a remedy for an actual violation of the Fourteenth Amendment, including Bill of Rights provisions incorporated by the Due Process Clause. *See City of Boerne*, 521 U.S. at 519-520 (Section 5 gives Congress power to provide remedies for constitutional violations); *Lane*, 124 S. Ct. at 2010 (Scalia, J., dissenting) (agreeing that Congress has Section 5 power to authorize lawsuits in cases of actual constitutional violations). Under the principles set forth in *Lane*, then, Title II's abrogation of state sovereign immunity must, at the very least, be upheld in a case such as this in which the statute is invoked to provide a remedy for an actual violation of the plaintiff's Fourteenth Amendment rights.

As the court of appeals acknowledged, App., *infra*, 3a, Goodman invokes Title II to challenge conduct that also

violates his Eighth Amendment rights against cruel and unusual punishment, rights that are incorporated in the Fourteenth Amendment's Due Process Clause. *See Robinson v. California*, 370 U.S. 660, 666 (1962). Accordingly, "'the complaint here call[s] for an application of the statute clearly constitutional'" under the Fourteenth Amendment. *Lane*, 124 S. Ct. at 1993 n.19 (quoting *Raines*, 362 U.S. at 24). Title II of the ADA can therefore properly be applied in this case even if it would exceed Congress's Section 5 power as applied to other prison cases. The court of appeals was wrong to rule otherwise.

C. This Case Presents The Best Opportunity To Resolve The Matters On Which The Courts Of Appeals Are In Conflict

This case presents the Court with a clear opportunity to resolve the conflicts detailed above. *Columbia River Correctional Institute v. Phiffer*, No. 04-947, which is currently pending on a petition for a writ of *certiorari*, also presents the question of the validity of Title II's abrogation of state sovereign immunity in the prison setting, but that case likely would not provide the Court the opportunity to resolve the matters that have created conflict and confusion in the Circuits.

The parties in this case have developed an extensive factual record, and the court of appeals held that the allegations in the complaint – which are mirrored by evidence presented at the summary judgment stage – state a claim for violation of the Eighth Amendment. As a result, this case presents the Court with an opportunity to address each of the three distinct arguments, discussed above, that the courts of appeals have confronted in deciding whether Title II is valid Section 5 legislation in

the prison context: that the statute is valid Section 5 legislation in all of its applications, as the Ninth Circuit held; that it is valid Section 5 legislation as applied to prison cases, a proposition the Eleventh Circuit rejected; and that it is valid Section 5 legislation as applied to cases in which the defendant violated the plaintiff's constitutional rights, a proposition the Eleventh Circuit also rejected but which a number of courts of appeals espoused prior to *Lane*, and which finds support in *Lane* itself.

Phiffer, by contrast, has not received the kind of factual development that will permit informed consideration of the as-applied approach to Section 5 analysis that this Court adopted in *Lane*. Indeed, because the *Phiffer* court did not receive supplemental briefing from the parties in light of *Lane*, this Court would be forced to decide the question of Title II's as-applied constitutionality as a matter of first view, without any analysis of the issue in the lower courts. Nor, unlike here, would this Court have the benefit of a court of appeals opinion that actually elucidated the ways in which the State's treatment of the plaintiff implicated his constitutional rights. And because the *Phiffer* plaintiff has not alleged that his treatment violated his constitutional rights, that case would not present this Court with an opportunity to address the question whether Section 5 empowers Congress to apply Title II in cases in which the statute provides a remedy for violations of the plaintiffs' constitutional rights. This case, unlike *Phiffer*, presents the best opportunity for the Court to resolve the issues that have drawn the Circuits into conflict.

As a consequence of the Eleventh Circuit's decision in this case, disabled state prisoners in the States of Alabama, Florida, and Georgia (who together imprison 12 percent of

the 1.3 million prisoners incarcerated in state prisons nationwide, *see* Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2003*, at 4 tbl. 4 (Nov. 2004)), have been deprived of the opportunity to enforce fully their federal rights under the ADA in contrast with similarly-situated prisoners in other States. That disparity should not be permitted to continue.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 9, 2005

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168

D. C. Docket No. 99-00012-CV-JEG-6

TONY GOODMAN,

Plaintiff-Appellant,

versus

O.T. RAY, et al.,

Defendants,

THE STATE OF GEORGIA,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor.

Appeal from the United States District Court
for the Southern District of Georgia

(SEPTEMBER 16, 2004)

Before CARNES, HULL and HILL, Circuit Judges.

HULL, Circuit Judge:

Plaintiff Tony Goodman, a paraplegic state prisoner, appeals (1) the dismissal of his Eighth-Amendment claims

brought under 42 U.S.C. § 1983, and (2) the grant of summary judgment on his disability-discrimination claims brought under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* ("ADA").

After review and oral argument, we: (1) reverse, in part, the district court's dismissal of Goodman's Eighth-Amendment claims for monetary and injunctive relief under § 1983; (2) reverse the magistrate judge's grant of summary judgment for the defendants on Goodman's ADA claims for injunctive relief; and (3) affirm the grant of summary judgment for all defendants with regard to Goodman's ADA claims for monetary damages under Title II of the ADA. We further order that Goodman be allowed an opportunity to amend and streamline his complaint as to his Eighth-Amendment claims and his ADA claims under Title II for injunctive relief.

I. FACTUAL BACKGROUND

According to the medical evidence in the record, Goodman was involved in an automobile accident in 1992, which left him unable to walk. Goodman is a wheelchair-dependant paraplegic, whose injuries include multiple spinal fractures.

In 1995, Goodman was convicted of aggravated assault, possession of a firearm by a convicted felon, and possession of cocaine with intent to distribute. On June 18, 1996, Goodman was transferred to Georgia State Prison ("GSP"), in Reidsville, Georgia. Goodman's complaint concerns his stay at GSP.

A. Complaint

After filing numerous administrative grievances with prison officials regarding the conditions of confinement at GSP, Goodman filed this federal suit claiming, *inter alia*, violations of the Eighth-Amendment and Title II of the ADA. Goodman's *pro se* complaint names the following defendants: (1) the Georgia Department of Corrections ("GDOC"); (2) the State of Georgia;[1] (3) J. Wayne Garner, the Commissioner of the GDOC; (4) A.G. Thomas, Director of Facilities Division of the GDOC; (5) Johnny Sikes, Warden of GSP; (6) J. Brady, Deputy Warden of GSP; (7) O.T. Ray, supervisor of guard shifts at GSP; (8) H. Whimbly, guard at GSP; (9) Margaret Patterson, guard at GSP; and (10) R. King, staff member at GSP. Goodman's complaint alleges, *inter alia*, that the defendants, in their individual and official capacities, were deliberately indifferent to his (1) serious medical needs and (2) conditions of confinement at GSP, in violation of the Eighth Amendment. Goodman sought monetary damages.

Goodman further claims that the defendants discriminated against him on the basis of his disability in violation of Title II of the ADA. Goodman sought both injunctive relief and monetary damages on his ADA claims.[2]

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[1] Goodman did not originally name the State of Georgia as a defendant, but after reviewing the complaint, the magistrate judge recommended that the State of Georgia be joined as a defendant to Goodman's ADA claims. As noted later, the proper defendant on Goodman's ADA claims for injunctive relief is actually Warden Johnny Sikes, in his official capacity.

[2] Goodman's complaint specifically prayed for attorney's fees, declaratory and injunctive relief, and punitive and compensatory damages in the amount of $600,000 from each individual defendant.

Because we are reviewing the dismissal of Goodman's Eighth-Amendment claims, we outline the factual allegations in his complaint, assuming all allegations to be true. *Cotton v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) ("In reviewing a complaint, we accept all well-pleaded factual allegations as true and construe the facts in the light most favorable to the plaintiff").

B. Conditions at GSP

Goodman is housed in a high/maximum security section of GSP, the K-Building. Prison officials claim that Goodman "was assigned to . . . the Special Management Unit [K-Building] both because of his continuous disruptive conduct and the special requirements associated with his being wheelchair bound."

Goodman is kept in his "K-1 unit" cell, measuring twelve-feet long by three-feet wide, for twenty-three to twenty-four hours per day. While Goodman has had some disciplinary problems in the past, Goodman's allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this is apparently the size of his cell whether or not he is in disciplinary isolation.[3]

According to Goodman, GSP does not provide reasonable accommodations for his paraplegia. Specifically, Goodman claims that the prison "lacks facilities for the disabled for hygiene, drinking and performing body excretion functions" and that GSP "is in a serious state of

[3] In a declaration attached to a motion for a TRO, Goodman avers that he once was in solitary confinement for forty-two straight days.

disrepair and fail[s] to meet minimal health and safety needs of the Plaintiff."

Beyond the inadequate prison conditions, Goodman claims that he has been denied access to "services, programs, and activities" at GSP by the defendants because of his disability. Specifically, Goodman states that the defendants have discriminated against him, based on his disability, because they have "refused and/or denied and/or excluded him from participation in MH/MR services, programs, and activities of the prison."

Further, Goodman claims that he "could be more appropriately treated in [a] more integrated community setting," and that his continued confinement in the "segregated environment" is "unlawful disability-based discrimination." In this regard, Goodman also contends that the classification procedures for the prison are inadequate because "a substantial number of prisoner[s] . . . are placed in maximum custody, when lesser degrees of custody would suffice." Goodman states that the classification procedures are inadequate because "there are insufficient staff members to give adequate time to each case, and staff members are inadequately trained."

Goodman provides numerous examples of the manner in which the prison conditions at GSP are inadequate for the disabled. Specifically, Goodman claims that he is unable to turn his wheelchair around inside of his twelve-foot-by-three-foot cell, and, thus, is virtually immobile. Goodman also alleges that he is unable to use his toilet, his bed, or the shower without assistance, and that the GSP prison officials or guards do not provide him with assistance. In fact, according to Goodman, he has been

forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him.

In his complaint, Goodman also states that he has suffered "long periods of deprivation of basic amenities," such as "showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service." Furthermore, Goodman states that he does not have access to the windows of his cell, the wall electrical plugs of his cell, and that GSP does not have wheelchair-accessible routes or rooms throughout the prison. Goodman also details the programs he has been denied access to, including: "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights."

C. Specific Instances of Injury

According to Goodman, there have been instances in which he was injured trying to use the toilet or the shower because the toilets and the showers do not have supports for disabled prisoners, and the prison staff did not provide him the necessary assistance. For example, Goodman states that on August 26, 1998, he had to "hurl" himself from his wheelchair onto the toilet, and that the toilet seat was not stabilized or secure. When he tried to return to his wheelchair from the toilet, Goodman states that he "slipped and fell onto the floor causing an epileptic seizure, and. . . . [he] broke his right toe and crushed his right knee."

Goodman claims that, on May 12, 1999, he "had a [bowel movement] and urine, on himself," and that he

requested cleaning supplies from "S.M.U. Capt. Mr. Brown, Mr. Smith, and Mr. Hall," and assistance in cleaning his wheelchair and cell, but all of them refused. He states that he was "forced to live in a cell where the floor was smeared with defecation and urine.... He was required to live and sit in his own body waste," while being refused repeated requests for cleaning supplies and assistance.

Goodman claims that, on May 14, 1999, he "broke his left foot and crushed his left knee," while trying to transfer himself to the toilet from his wheelchair. Goodman alleges that Captain Brown denied his requests for help cleaning his cell and for medical care.

Goodman also describes how he was harmed in the showering facility at GSP because it was without adequate support for prisoners with disabilities. On April 8, 1998, Goodman states that "C.O. II Whimbly took a toilet set into the shower for the Plaintiff to sit on while showering, but the toilet seat is not accessible. Plaintiff was trying to transfer from his [wheelchair] to the toilet chair but the toilet seat turned over and he fell to the floor and was hurt at [the] head, neck, [and] left arm."[4] Goodman also claims that he was denied adequate medical care following this incident.

Goodman further claims that the prison officials have not taken appropriate measures to safely transport inmates with disabilities. Goodman describes one occasion in which he was transferred from GSP to the federal court

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[4] It appears that Goodman is occasionally given a "toilet set" while in the shower, but that he cannot reach the seat of the toilet set without assistance.

building in Atlanta, Georgia, in a vehicle that was not equipped for wheelchair-bound passengers. Specifically, Goodman states that on May 5, 1998, he was "forced to ride handcuffed and shackled in the back of a van without seatbelts or restraints," and that "the seat which he was seated in was not stabiled [sic] or secure." As a result, Goodman states that he "fell to the floor and lost consciousness several times," and that he "suffer[ed] injures [sic] and pains at head, neck, back, stomach and legs." Goodman also states that upon his return, he made a request to Officer Hays and R. Smith "to see someone from medical . . . but medical refused to see or examine [him]."

In addition to Goodman's allegations that the defendants have purposefully denied him medical treatment, Goodman states that he has been denied catheters and rehabilitative therapy. He also claims that he has an asthma and a bronchitis condition that are aggravated by the air quality of his cell. Despite his requests for a change, the air in Goodman's cell is heated in the summer with high humidity and little ventilation and cooled in the winter, and Goodman has "a very hard time trying to breath inside of [the] cell." Finally, Goodman claims that the defendants have failed "to provide any assistance in preventing dangerous bedsores," and that he has been denied appointments with mental-health counselors, despite making numerous requests. In fact, Goodman asserts that he was forced to live under inhumane conditions; namely, in his cell without clothing under very cold temperatures.

With regard to these allegations, Goodman claims that GSP officials – Warden Sikes, Deputy Warden Brady, Supervisor Ray, Dr. Lowry, Dr. Mailloux, Barbara Werth, L. Waters, J. Bradford, J. Paris, and Lynn O. Smith – "had

knowledge and notice that [Goodman] was not secured, safe or stabilized in this cell," and that "despite this knowledge of his precarious and perilous placement within the prison cell the above named agents proceeded to house him in a prison cell which was in total disregard of his health, safety and well-being."

D. Dismissal of Goodman § 1983 Claims

As provided for in 28 U.S.C. § 1915A, the magistrate judge reviewed Goodman's complaint for cognizable claims. With respect to the § 1983 claims, the magistrate judge concluded that Goodman's allegations were vague and constituted insufficient notice pleading under Federal Rule of Civil Procedure 8. Specifically, the magistrate judge stated that Goodman's complaint did not "set forth a short, plain statement of the facts as to each defendant," and was deficient because it did not state "what specific constitutional violations occurred, the specific acts committed by each defendant that resulted in a particular constitutional violation, or on what date these alleged acts occurred." Thus, the magistrate judge recommended that the § 1983 claims against all defendants be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(ii). The magistrate judge alternatively noted that the GDOC, as a state agency, is immune from a § 1983 suit under the Eleventh Amendment.

With respect to Goodman's ADA claims, the magistrate judge stated that his suit against the GDOC is actually against both the State of Georgia and the GDOC. The magistrate judge pointed out that the ADA applies to services, programs, and activities of "a public entity," making the State of Georgia a proper defendant for

Goodman's ADA claims. Thus, the magistrate judge recommended that the ADA claims be allowed to proceed against the GDOC and that the State of Georgia be joined as a defendant.

Noting that the United States Supreme Court had not addressed the question of whether the application of the ADA to state prisons was a constitutional exercise of Congressional power under the Commerce Clause or under the Fourteenth Amendment, the magistrate judge determined that Goodman's allegations "arguably stated a colorable claim for relief under 42 U.S.C. § 12131."

On August 20, 1999, the district court, in a one-page order, adopted the magistrate judge's recommendations and dismissed Goodman's § 1983 claims against all defendants and dismissed the ADA claims against all defendants, except for his ADA claims against defendants the GDOC and the State of Georgia. Goodman was not given an opportunity to amend his complaint.

E. Summary Judgment on Goodman's ADA Claims

Following the dismissal of Goodman's § 1983 claims, the parties filed cross motions for summary judgment as to his ADA claims.[5] In support of his summary judgment

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[5] Throughout the summary-judgment stage, some of the pleadings and orders do not name both defendants State of Georgia and the GDOC. However, we construe those pleadings as filed by both defendants and those orders as relating to both defendants because both defendants were the named defendants when the district court ordered that the ADA claims proceed to summary judgment and because both defendants appear on subsequent court documents.

motion, Goodman attached a statement of undisputed facts and his own and three other inmates' affidavits, which mirrored the allegations in his complaint, including such statements as: (1) Goodman was kept in his small cell in K-Building twenty-three hours per day; (2) Goodman was denied the full range of all privileges and rights to which other inmates in similar security classifications have access; (3) Goodman was denied access to medical care and treatment; (4) the prison was "not properly equipped to secure and house handicapped patients," nor was it wheelchair-accessible; and (5) Goodman had injured himself on a number of occasions trying to transfer to his cell toilet.

In response, defendants the State of Georgia and the GDOC denied most of Goodman's statement of undisputed facts and disagreed with Goodman's affidavits. The defendants also sought summary judgment with respect to Goodman's ADA claims, arguing that: (1) the State of Georgia had immunity from his ADA claims for monetary damages under the Eleventh Amendment; (2) his ADA claims for injunctive relief were moot; (3) the ADA did not apply to state prisons; (4) his claims failed on the merits; and (5) his claims were foreclosed by the Prison Litigation Reform Act ("PLRA").

On February 10, 2000, the magistrate judge recommended that both motions be denied, determining that: (1) states are not immune to suit brought under the ADA; (2) Goodman's claim for injunctive relief was not moot despite his transfer; and (3) there were issues of fact. The magistrate judge identified the issues of fact, as follows: (1) whether the defendants reasonably accommodated Goodman's disability; (2) whether Goodman was a "qualified

individual" under the ADA; and (3) whether Goodman's claim for mental suffering was foreclosed by the PLRA.

On March 6, 2000, the district court adopted the magistrate judge's report and denied Goodman's and the defendants' motions for summary judgment.[6] On June 14, 2001, the parties consented to trial by the magistrate judge. On October 22, 2001, the State of Georgia and the GDOC again moved for summary judgment based on and due to the then-new Supreme Court decision in *Board of Trustees of the University of Alabama, et al. v. Garrett,* 531 U.S. 356, 121 S. Ct. 955 (2001).

On December 12, 2001, the magistrate judge granted the State of Georgia and the GDOC's joint motion for summary judgment, determining that Goodman's claims for monetary damages under the ADA were precluded by the Eleventh Amendment and that his claims for injunctive relief were rendered moot due to his transfer from GSP to Valdosta State Prison.

Goodman appeals the district court's dismissal of his § 1983 claims and the grant of summary judgment on his ADA claims for monetary damages and injunctive relief.[7]

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[6] Goodman also filed a number of emergency motions for injunctive relief when transferred to different prisons claiming the same violations he alleged in his complaint; all of the motions were denied by the district court.

[7] Goodman's complaint also alleges: (1) racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17, and the Equal Protection Clause; (2) violations of the Due Process Clause; (3) retaliatory action by prison officials as a result of his filing lawsuits; (4) unsanitary/inadequate food conditions and preparation; and (5) unsafe conditions in not having fire drills. While Goodman appeals the dismissal of these claims as well, the district

(Continued on following page)

II. STANDARD OF REVIEW

We review *de novo* the dismissal of a complaint for failure to state a claim under 28 U.S.C. § 1915A(b)(1). *Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1278 (11th Cir. 2001).[8] In reviewing the dismissal of a complaint, we accept all the alleged facts as true and view them in the light most favorable to the non-moving party. *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). Dismissal of the complaint is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*) (internal quotation marks and citations omitted); *see also GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("[w]hile Fed. R. Civ. P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim.").

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court did not err in dismissing these claims, and we affirm their dismissal without further discussion.

[8] In *Leal*, this Court first considered the issue of the applicable standard of review for an appeal of a dismissal pursuant to 28 U.S.C. § 1915A(b)(1). 254 F.3d at 1278. This Court concluded that *de novo* review was appropriate because § 1915A(b)(1) tracked the language of 28 U.S.C. § 1915(e)(2)(B)(ii). *Leal*, 254 F.3d at 1279. This Court previously had determined that because § 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6), it should be subject to the same, well-settled *de novo* review standard for Rule 12(b)(6) dismissals. *Id.* at 1278.

We review the grant of summary judgment *de nova*, viewing all evidence and factual inferences therefrom in the light most favorable to the non-moving party. *Wascura v. City of South Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

III. SECTION 1983 CLAIMS

Regarding the dismissal of Goodman's § 1983 claims for monetary damages, we affirm the district court's dismissal as to: (1) the GDOC; (2) Garner and Thomas, in their individual and official capacities; and (3) the remaining GSP defendants in their official capacities.[9]

We affirm the dismissal as to the GDOC because the Eleventh Amendment bars a § 1983 claim against the GDOC. *Stevens v. Gay*, 864 F.2d 113, 115 (11th Cir. 1989) (citing *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057 (1978) (per curiam)).

With regard to Commissioner Garner and Director Thomas, Goodman has alleged no factual basis or theory that states a claim for any form of relief against these two men who work at the state level and not directly at GSP. Therefore, we affirm the district court's dismissal of Goodman's § 1983 claims against Gamer and Thomas, in their individual and official capacities.

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[9] As stated earlier, the State of Georgia is a defendant in this case for the purposes of Goodman's ADA claims only. While Goodman clearly focuses on both monetary damages and injunctive relief under the ADA, his Eighth-Amendment claims under § 1983 appear to be focused on obtaining monetary damages.

As to the remaining defendants, who are all GSP prison officials, suits for monetary damages under § 1983 are valid only against prison officials in their individual, not official, capacities. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) (stating "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *D'Aguanno v. Gallagher,* 50 F.3d 877, 879 (11th Cir. 1995) (permitting suits under § 1983 for monetary damages against state officials in their individual capacities). Consequently, we affirm the district court's dismissal of Goodman's § 1983 claims against the remaining GSP defendants in their official capacities.

However, we conclude that the district court erred in dismissing some of Goodman's § 1983 claims for monetary damages against the remaining individual defendant prison officials at GSP, in their individual capacities. We do so for the following reasons.

A. Eighth Amendment Principles

"Whether one characterizes the treatment received by [a partially paraplegic inmate] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard. . . . " *Evans v. Dugger,* 908 F.2d 801, 804-06 (11th Cir. 1990) (citations omitted). In defining the deliberate indifference standard, the Supreme Court stated:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk

> to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan. 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994).

Courts use a two-part analysis in Eighth-Amendment challenges to conditions-of-confinement and failure-to-attend-to-medical-needs cases. Under the objective component, a prisoner must prove the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999 (1992). Specifically, a prisoner must prove "a serious medical need" or the denial of "the minimal civilized measure of life's necessities." *Chandler v. Crosby*, No. 03-12017, Slip Op. at 3369 (11th Cir. August 6, 2004); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *see Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 1000 (1981). "The challenged prison condition must be 'extreme'" and must "pose an unreasonable risk of serious damage to his future health." *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 9, 112 S. Ct. at 1000).

Under the subjective component, the prisoner must prove that the prison official acted with "deliberate indifference." *Farmer*, 511 U.S. at 836, 837, 114 S. Ct. at 1978, 1979; *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999; *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327 (1991). To show deliberate indifference, the prisoner must show that the defendant prison official "'acted with a sufficiently culpable state of mind'" with regard to the serious prison condition or serious medical need in issue. *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999). Negligence does not satisfy this standard. *Id.* A

prisoner need not prove the prison official acted with "'the very purpose of causing harm or with knowledge that harm [would] result.'" *Id.* (quoting *Farmer,* 511 U.S. at 835, 114 S. Ct. at 1970). However, a prison official may escape liability for known risks "if [he] responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844, 114 S. Ct. at 1982-83 (quotation marks and citations omitted).

B. Goodman's Allegations Under Section 1983

The magistrate judge and district court correctly noted that Goodman's complaint was less than a model of clarity. However, this is not a "pure" case of failure to state a claim. Rather, we conclude that the allegations contained in Goodman's complaint, TRO motions, and other court filings evidence sufficient allegations to proceed with a limited number of Eighth-Amendment claims under § 1983.

Although Goodman never formally requested leave to amend his complaint, Goodman's filings, taken as a whole, evidence a desire to add facts and substance to his allegations. For example, on May 24, 1999, Goodman filed a "Motion to Amend his Emergency Motion for T.R.O. and/or P.I." Under these circumstances, the act of dismissal, without leave to amend, was too severe a sanction. Rather, Goodman should have been given an opportunity to amend and streamline his complaint. *See generally Troville v. Venz,* 303 F.3d 1256, 1260 (11th Cir. 2002); *Magluta v. Samples,* 256 F.3d 1282, 1284 (11th Cir. 2001).

Therefore, we remand this case to the district court so that Goodman may be permitted to amend his § 1983 claims for Eighth-Amendment violations. However, we

caution Goodman that this is not an invitation to assert all of his purported Eighth-Amendment claims, some of which are obviously frivolous. Rather, three of his claims regarding his conditions of confinement and need for medical care, if true, should be the focus of his amended complaint.

First, Goodman alleges that he is not able to move his wheelchair in his cell. If Goodman is to be believed, this effectively amounts to some form of total restraint twenty-three to twenty-four hours-a-day without penal justification. *See Hope v. Pelzer*, 536 U.S. 730, 738, 122 S. Ct. 2508, 2514-15 (2002). Second, Goodman has alleged several instances in which he was forced to sit in his own bodily waste because prison officials refused to provide assistance.[10] Third, Goodman has alleged sufficient conduct to proceed with a § 1983 claim based on the prison staff's supposed "deliberate indifference" to his serious medical condition of being partially paraplegic; that is, knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison facilities

[10] Courts typically accord particular weight to exposure to human waste in condition-of-confinement cases. *See McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (finding "sufficiently serious conditions of confinement" where inmate in feces-covered cell for three days); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) ("unquestionably a health hazard" to live in "filthy water contaminated with human waste"); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) ("courts have been especially cautious about condoning conditions that include an inmate's proximity to human waste"); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (three days in cell with feces smeared on walls not within "civilized standards, humanity, and decency"); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2nd Cir. 1972) ("Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.").

for the disabled, such as toilets without the necessary support or handrails. *See Miller v. King,* No. 02-13348, slip op. at ___ (Sept. ___, 2004); *Evans v. Dugger,* 908 F.2d 801, 804-06 (11th Cir. 1990).

As we did in *Magluta v. Samples,* 375 F.3d 1269 (11th Cir. 2004),

> [w]e emphasize the hypothetical nature of our holding in this case. If the defendants at later stages of this litigation, *e.g.,* at summary judgment, can establish that legitimate reasons do in fact exist and/or the conditions of the confinement are not as harsh or prolonged as alleged, then a different case will be presented. Additionally, although [Goodman] has specifically alleged that he advised each defendant personally of the violations of his constitutional rights only to be rebuffed, and that each had personal involvement in relevant decisions, development of the record at summary judgment may reveal that one or more of the defendants in fact had no personal involvement or liability.

Id. at 1276 n.5.

IV. ADA Claim for Injunctive Relief

We first affirm the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment. *Miller v. King,* No. 02-13348, slip op. at___. The magistrate judge, however, erred in determining that Goodman's ADA claims for injunctive relief under Title II were moot for the following reasons.

It is true that "[t]he general rule is that a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief" *McKinnon v. Talladega Co.*, 745 F.2d 1360, 1363 (11th Cir. 1984) (citation omitted). The "capable of repetition, yet evading review" doctrine provides an exception to the general rule of mootness. That doctrine requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). In *Preiser v. Newkirk*, 422 U.S. 395, 402-03, 95 S. Ct. 2330, 2334-35 (1975), the Supreme Court concluded that the "capable of repetition, yet evading review" doctrine would not apply in prison transfer cases if the likelihood of re-transfer was remote and speculative.

Since the filing of his lawsuit in 1999, Goodman has been transferred nine times: (1) July 1999, to Lee Arrendale State Prison; (2) November 1999, to Macon State Prison; (3) January 2000, to Baldwin State Prison; (4) February 2000, back to GSP; (5) March 2000, to Augusta State Medical Prison; (6) August 2000, to Hays State Prison; (7) March 2001, to Valdosta State Prison; (8) November 2003, to Ware State Prison; and (9) January 2004, back to GSP.[11] At oral argument, the government indicated that Goodman had been transferred again to Valdosta State Prison. However, this Court continues to list Goodman's address as GSP, given that we have received status-report requests from Goodman at GSP as recently as April 21, 2004.

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[11] The district court's docket sheet indicated a January 5, 2004, change of address for Goodman to GSP.

What is certain is that Goodman is either at GSP or the likelihood of his eventual transfer back to GSP is far from remote or speculative. Consequently, we conclude that the "capable of repetition, yet evading review" doctrine applies in this case and that Goodman's claims for injunctive relief under Title II of the ADA are not moot.

Therefore, this case is remanded to the district court to consider Goodman's claims for injunctive relief under Title II of the ADA. Because Goodman is already amending his complaint for the purposes of his § 1983 action, Goodman may also take this opportunity to present a clearer picture of his allegations for injunctive relief under Title II of the ADA. *See Miller,* No. 02-13348, slip op. at ___ (outlining the requirements for stating a claim under Title II of the ADA). Furthermore, the proper defendants on Goodman's ADA claims for injunctive relief should be Warden Sikes and Commissioner Garner, in their official capacities, not the State of Georgia or the GDOC.[12] *See Miller,* No. 02-13348, slip op. at ___.

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[12] Because Goodman has been transferred so many times and for judicial economy, we conclude that Goodman may also pursue his ADA claims for injunctive relief against Commissioner Garner. By so concluding, any subsequent transfer away from GSP would not render Goodman's ADA claims under Title II moot. *See Randolph v. Rodgers,* 253 F.3d 342, 345-46 (8th Cir. 2001) (prisoner's claims against the director of the state prison system were not moot upon transfer to another prison because the director had authority over the entire prison system). Further, the Commissioner has the power to provide funds in order to bring a particular prison, if ordered by a court, into ADA compliance or to transfer a prisoner to a prison that is ADA-compliant. *See* Ga. Code § 42-2-8 ("Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and

(Continued on following page)

V. CONCLUSION

For all the above reasons, we vacate the dismissal of Goodman's § 1983 claims for Eighth-Amendment violations against the remaining six GSP officials, in their individual capacities, with regard to his assertions that: (1) he is left immobile in his cell for prolonged periods of time; (2) he is forced to spend significant time in his own waste because prison officials refuse to provide assistance; and (3) prison officials are deliberately indifferent to his needs as a partially paraplegic prisoner; that is, knowingly providing no physical, therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison conditions for the disabled, such as toilets with the necessary support or handrails. In all other respects, we affirm the district court's dismissal of Goodman's § 1983 claims for Eighth-Amendment violations.

With respect to Goodman's ADA claims, we affirm the magistrate judge's grant of summary judgment as to Goodman's claims for monetary relief under Title II of the ADA against all defendants, but vacate the grant of summary judgment on Goodman's claims for injunctive relief under Title II of the ADA. The proper defendants on Goodman's ADA claims for injunctive relief are Warden

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control of inmates or other functions as are related to the discharge of these responsibilities. . . . "); Ga. Comp. R. & Reg. § 125-2-4.18(1) ("The Commissioner shall . . . have sole authority to transfer inmates from one correctional institution to any other institution."). Should Garner no longer be the Commissioner, the district court shall identify the current Commissioner and allow Goodman to substitute that state official as a defendant, in his official capacity, as to his ADA claims for injunctive relief.

Sikes and Commissioner Garner (or the current Commissioner), in their official capacities.

VACATED, REVERSED, and REMANDED, in part; AFFIRMED, in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

TONY GOODMAN, Plaintiff,	:	CIVIL ACTION NO.: CV699-012
vs.	:	
THE STATE OF GEORGIA, Defendant.	:	

ORDER

(Filed Dec. 20, 2001)

Plaintiff, an inmate currently confined at Valdosta State Prison in Valdosta, Georgia, filed this civil rights action pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement. Plaintiff alleges, inter alia, that the State of Georgia did not provide him with reasonable accommodations in violation of the Americans With Disabilities Act. Defendant has filed a Motion for Summary Judgment. (Dkt Nos. 88, 89, and 90.) Plaintiff has filed a Response and an Amended Response. (Dkt. Nos. 91, 92, and 93.)

STATEMENT OF FACTS

Plaintiff, a wheelchair-bound inmate, filed suit against the State of Georgia, among others, contending that the State violated Title II of the Americans With Disabilities Act. Specifically, Plaintiff contends that he was transferred from a medical prison to Georgia State Prison

which was not equipped to deal with his needs. He contends that he was placed in administrative segregation and was denied access to the law library, church, and gymnasium. He also contends that GSP did not have wheelchair accessible bathrooms, shower stalls, sinks, and entrances to buildings. Plaintiff alleges that he was deprived of counseling, education, vocational training, and recreation activities. Plaintiff has requested monetary and injunctive relief.

Defendant asserts that Plaintiff is prevented, by the Eleventh Amendment, from pursuing his ADA claim for money damages. Defendant also asserts that Plaintiff's request for injunctive relief does not state a claim upon which relief can be granted.

STANDARD OF DETERMINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The procedure for disposing of a summary judgment motion is well established. The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970) In applying this standard, the *Adickes* Court explained that a court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion. All reasonable doubts regarding the facts should be resolved

in favor of the nonmovant. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608.

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Celotex Corp. v. Catrell*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. *Id.*; *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). To oppose the motion sufficiently after the movant has met his initial burden, the nonmoving party must point to evidence in the record or present additional evidence in the form of affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure. *Riley v. Newton*, 94 F.3d 632, 639 (11th Cir. 1996). If the record presents factual issues, the Court must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).[1] Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969)

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[1] In *Bonner v City of Prichard*, 661 F 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981

DISCUSSION AND CITATION OF AUTHORITY

I. Plaintiffs Claim For Monetary Damages.

The State of Georgia asserts that it is entitled to Eleventh Amendment immunity from money damages. The Supreme Court recently determined that the Eleventh Amendment prevents states and state entities from being sued for money damages under Title I of the Americans with Disabilities Act. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 960, 148, L. Ed. 2d 866 (2001). The *Garrett* decision addresses whether states are immune from Title I of the ADA, but does not mention state immunity from Title II suits, such as Plaintiff is pursuing here. *Garrett*, 121 S. Ct. at 960 n.1. In *Williamson v. Georgia Department of Human Resources, et. al.*, this Court concluded that states are also immune from suits under Title II. 150 F. Supp. 2d 1375 (S. D. Ga. 2001). Following the rubric established by the Supreme Court in *Garrett, Williamson* concludes that Congress did not identify a pattern of unconstitutional behavior by the States, and therefore did not abrogate traditional Eleventh Amendment immunity. *Williamson*, 150 F. Supp. 2d 1375, 1381. Plaintiff's claims for money damages against the State of Georgia are precluded by the Eleventh Amendment.

II. Plaintiff's Claim For Injunctive Relief.

Plaintiff has also, on numerous occasions, requested a preliminary injunction. Plaintiff has requested, as addressed by Defendant's first Motion for Summary Judgment, that he be transferred out of Georgia State Prison because it did not accommodate his needs as provided by the Americans with Disabilities Act. The record reflects

that Plaintiff was transferred from Georgia State Prison to Lee Arrendale State Prison prior to July 1999. (Dkt. No. 17.) Plaintiff was transferred to Macon State Prison prior to November 1999. (Dkt. No. 27.) Plaintiff was transferred to Baldwin State Prison in January 2000. (Dkt. No. 35.) He was transferred back to Georgia State Prison in February 2000. (Dkt. No. 39.) Plaintiff was moved to Augusta State Medical Prison in March 2000. (Dkt. No. 45.) Plaintiff notified the court of his transfer to Hays State Prison at the end of August 2000. (Dkt. No. 49.) Plaintiff was transferred to Valdosta State Prison in March 2001. (Dkt. No. 56.)

Plaintiff brought this claim in January 1999, claiming that Georgia State Prison did not comply with the Americans with Disabilities Act. Plaintiff was transferred out of GSP in July 1999, and has spent time in numerous institutions, including medical prisons since the time he filed his complaint. Currently, Plaintiff is incarcerated in Valdosta State Prison. Plaintiff's claim for injunctive relief has been rendered moot by his transfer from Georgia State Prison. *Minnesota Humane Society v. Clark*, 184 F.3d 795 (8th Cir. 1995); *McAlpine v. Thompson*, 187 F.3d 1213 (10th Cir. 1999).

CONCLUSION

For the above and foregoing reasons, summary judgment is **GRANTED** to Defendant.

SO ORDERED, this 20th day of December, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168-GG

TONY GOODMAN,

Plaintiff-Appellant,

versus

O. T. RAY, et al.,

Defendants,

THE STATE OF GEORGIA,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Dec. 9, 2004)

Before: CARNES, HULL and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hall
UNITED STATES CIRCUIT JUDGE

APPENDIX D

The Constitution of the United States provides, in part:

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, provides in part:

§ 12101. Findings and purpose

(a) Findings

The Congress finds that-

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary

qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.